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Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1972

No. 72-733

MICHIGAN NATIONAL BANK,
a National Banking Association, *Petitioner*,

VS.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
IN AND FOR THE COUNTY OF CONTRA COSTA,
Respondent,

LARRY H. KELL, *Real Party in Interest.*

PETITION FOR WRIT OF CERTIORARI
to the Court of Appeal of the State of California

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In the Supreme Court
OF THE
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OCTOBER TERM, 1972

No.

MICHIGAN NATIONAL BANK,
a National Banking Association, *Petitioner*,

VS.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
IN AND FOR THE COUNTY OF CONTRA COSTA,
Respondent,

LARRY H. KELL, *Real Party in Interest*.

PETITION FOR WRIT OF CERTIORARI
to the Court of Appeal of the State of California

Petitioner, Michigan National Bank, a National Banking Association, prays that a Writ of Certiorari issue to review the order of the Court of Appeal, First Appellate District, Division Three, of the State of California, rendered without opinion in these proceedings on August 21, 1972.

OPINIONS BELOW

The order of the Court of Appeal, First Appellate District, Division Three, was rendered without opinion. (Appendix A.) The Supreme Court of the State of California confirmed that order by denying a petition for a hearing on September 20, 1972, also without opinion. (Appendix B.)

JURISDICTION

The order of the Court of Appeal of the State of California was entered on August 21, 1972. This Petition for Writ of Certiorari was filed less than ninety days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

Real Party in Interest, Larry H. Kell, commenced Action No. 122,937 in the Superior Court of the State of California, in and for the County of Contra Costa, on November 4, 1970, for the alleged unlawful taking of his personal property.

On May 29, 1971, service of summons was purportedly made on Petitioner, Michigan National Bank, a National Banking Association, through the office of the Secretary of State.

Petitioner, Michigan National Bank, a National Banking Association, has no office in the State of

California and never has established an office in California. Petitioner is "established" or "located" within the meaning of Title 12, United States Code, Section 94, in the State of Michigan only.

On June 4, 1971, Petitioner filed a motion to quash service of summons, the evidentiary support for which was set forth in the affidavit of Petitioner's vice-president. (See Appendix E.) Real Party in Interest filed no declaration or affidavit in opposition to Petitioner's motion or in support of his contention that Petitioner did waive the provisions of Title 12, United States Code, Section 94.

On July 2, 1971, Petitioner's motion to quash service of summons was denied.

On July 6, 1971, Petitioner filed a motion to stay action or dismiss pursuant to Section 418(a)(2) of the California Code of Civil Procedure, upon the ground that the mandatory venue requirements of Title 12, United States Code, Section 94, requires that said action neither be dismissed or be transferred to and tried in the State of Michigan.

On July 12, 1971, Petitioner filed a Petition for Writ of Mandate in the Court of Appeal, State of California, First Appellate District, Division One. The hearing of Petitioner's motion to stay or dismiss was continued by stipulation of the parties pending the decision of the Court of Appeal on Petitioner's Petition for Writ of Mandate. On January 24, 1972, the Court of Appeal filed an opinion (see Appendix C) which in essence ruled on the Petition for Writ of Mandate as follows:

1. That the facts in the Memorandum of Points and Authorities of Real Party in Interest are not set forth by affidavit or declaration as provided by law.

2. Certain of the facts set forth in the unverified Memorandum of Points and Authorities of Real Party in Interest are true, among which are:

(a) That Petitioner solicits "with its forms the refinancing of sales of airplanes, sold and to be harbored in this state.

(b) That it is "alleged" that the purchaser-plaintiff was wronged by the bank's action in enforcing its security interest in an airplane purchased in this state, and financed on forms which indicated that Petitioner would be the Real Party in Interest in the payment of the purchase price.

(c) That it was contemplated that the airplane would be based in the county where the action was commenced and it is "alleged" the airplane was seized there.

On the basis of the foregoing facts, the Court of Appeal concluded that:

(a) The Petitioner is doing business in California and is therefore subject to the jurisdiction of the Courts of the State of California.

(b) Petitioner has, on the facts, waived its federally given right to have actions in which it is named as a defendant, tried in the state and district where the bank is "established", i.e., the State of Michigan.

Subsequent to the filing of the opinion by the Court of Appeal, First Appellate District, Division One, counsel for Petitioner, Joseph W. Jay, Jr., who has since been appointed Judge of the Municipal Court of Fremont-Newark-Union City Judicial District, filed a Petition for Rehearing.

The opinion filed January 24, 1972, by the Court of Appeal, First Appellate District, Division One, was modified on February 23, 1972 (see Appendix D) and at the same time Petitioner's petition for a rehearing was denied.

This modification and denial of the rehearing was received in counsel for Petitioner's office; however, due to clerical error, it was misfiled and not brought to counsel's attention and for this reason counsel failed to file a petition for rehearing in the Supreme Court within the required time.

On March 15, 1972, counsel for Petitioner sought a relief from default due to inadvertence and mistake which relief was denied by the Supreme Court of California.

Thereafter, the motion to stay or dismiss which had previously been filed on July 6, 1971, before the Superior Court was argued by the respective parties and an order was entered by Superior Court of Contra Costa County on July 3, 1972, denying said motion.

On July 13, 1972, Petitioner filed Petition for Writ of Mandate in the Court of Appeal of the State of California, First Appellate District, Division Three,

and on August 21, 1972, that petition was denied without opinion. (Appendix A.)

It seems clear that the denial of this Petition for Writ of Mandate, without opinion, is based primarily on the decision of the Court of Appeal of the State of California, First Appellate District, Division One, which was filed on January 24, 1972, and subsequently modified on February 23, 1972.

The opinion of the Court of Appeal was written by Justice Sims and concurred in by Presiding Justice Molinari and Justice Elkington. A copy of the opinion and the subsequent modification are attached to this Petition as Appendices C and D.

The questions thereby arising are:

1. Whether the rights and privileges provided in 12 U.S.C. 94 may be waived without some substantive act.

2. Whether the courts of the State of California may impose, as a condition of doing business in California, a waiver of the rights and privileges granted to the National Banking Associations by the Federal Congress in 12 U.S.C. 94.

3. Whether the actions of the California Court of Appeal denying the Petition for Writ of Mandate thereby confirming the decision of the Superior Court of the State of California, in and for the County of Contra Costa, denying Petitioner's motion to stay or dismiss under authority under 12 U.S.C. Section 94 is an unconstitutional interference of interstate commerce.

4. Whether the actions of the California Court of Appeal are an unconstitutional disregard of the supremacy clause of the United States Constitution.

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTORY PROVISIONS INVOLVED

1. The Constitution of the United States, Article I, Section 8, Clause 3:

> "To regulate commerce with foreign nations common among the several states, and with the Indian Tribes."

2. The Constitution of the United States, Article VI, Clause 2:

> "This Constitution and the laws of the United States which shall be made and pursuant thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

3. Title 12, United States Code Section 94:

> "Actions and proceedings against any association under this chapter may be had in any district or territorial court of the United States held within a district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

STATEMENT OF FACTS

Only the following facts were properly before the Court of Appeal and trial court:

1. Petitioner is a national banking association organized under the laws of the United States of America, as proved by certified copies of federal charter attached to the duly executed affidavit of Petitioner's vice-president, H. J. Candle.

2. Petitioner is "located" or "established" in the State of Michigan and at all relevant times had no office in the State of California (affidavit of H. J. Candle).

3. A complaint was filed by Real Party in Interest on November 4, 1970, Hearing No. 122,937, and alleging in part:

> "4. On or about said date, in the City of Concord, County of Contra Costa, defendants unlawfully took and carried away said pesonal property and converted and disposed of the same to their own use . . .".

Except for some standard allegations of the complaint pertaining to fictitiously named defendants, plaintiff's residence and claimed interest in an airplane, and damages, there are no other facts set forth in any affidavit, declaration or verified pleading.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below is a frustration of federal legislation in a field wholly occupied by the federal government. In denying Petitioner's Petition for Writ of Mandate to compel the California Su-

perior Court to stay or dismiss this action, the Court relied upon its own prior opinion in this case. (Appendix A.)

In that opinion, at page 15, the Court said:

> "In this case it is concluded that the Michigan Bank, by soliciting with its forms the refinancing of sales of airplanes, sold and to be harbored in this state, is not only doing business in this state so as to be subject to the jurisdiction of the courts of this state in disputes involving such transactions, but also has *waived* the requirements of Section 94 insofar as such suits are concerned." (Emphasis added.)

In effect the California Court of Appeal equates the concept of "doing business" for jurisdictional purposes with a waiver of venue. In Petitioner's view, this holding would render altogether meaningless the Congressional enactment permitting suits to be brought in the county in which the bank is chartered.

Section 410.10 of the California Code of Civil Procedure provides:

> "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or the United States."

The California Courts of Appeal have interpreted this section to manifest an intent to exercise the broadest possible jurisdiction.

See:

McGee v. International Life Insurance Co. (1957) 355 U.S. 220, 222-224;

Buckeye Boiler Co. v. Superior Court (1969) 71 Cal.2d 893, 898-900.

In fact, the courts of this state have already ruled that the financing of the purchase and sale of airplanes within this state is an activity which may subject the financing institution to the jurisdiction of the courts of this state with respect to disputes connected with such transactions. (*Pope v. National Aero Finance Co.* (1963) 220 Cal.App. 709, 719.) Further, *McGee v. International Life Insurance Co.*, supra, makes it clear that jurisdiction may attend an isolated transaction.

Therefore, under the existing law of the State of California, it appears that the courts of California are advising Petitioner that the mere fact of doing business in this state will act as a waiver of the federally granted right to be sued only in the county in which it is chartered. Such a finding of waiver is contrary to the decisions of the California courts which have long required clear convincing evidence of waiver.

See:

Roesch v. DeMoto, 24 Cal.2d 563;
City of Ukiah v. Fones, 64 Cal.2d 102.

Moreover, such a finding is contrary to those California decisions which have previously interpreted 12 U.S.C. Section 94.

See:

Monarch Wine Co. v. Butte (1952) 113 Cal. App. 833;
Ebeling v. Continental Illinois National Bank & Trust Co. (1969) 272 Cal.App.2d 724.

In *Ebeling* the court stated as follows:

"The record reflects that Continental Illinois National Bank and Trust Company of Chicago (CINB) is a national banking association organized under and by virtue of the laws of the United States and has its principal office and place of business in the City of Chicago, County of Cook, State of Illinois. Moreover, CINB does not now, and never has, maintained an office in California.

"Title 12, United States Code, Section 94, governing the place of trial of actions against national banking associations, provides in pertinent part as follows: 'Actions and proceedings against any association under this chapter may be had . . . in any state, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.'

"A national bank for jurisdictional purposes is a citizen of the state wherein it is established or located (28 U.S.C. Sec. 1348) and can only be sued in a state court in the county in which it is located (*Mercantile Nat. Bank at Dallas v. Langdeau*, 371 U.S. 555, 561 [9 L.Ed.2d 523, 528, 83 S.Ct. 520].)

"(2) A national banking association is 'established' or 'located', as those terms are used in Section 94, only at the national banking association's principal place of business as set forth in its charter. (*Buffum v. Chase Nat. Bank of City of New York* [7th Cir. 1951] 192 F.2d 58, cert. den. 342 U.S. 944 [96 L.Ed. 702, 72 S.Ct. 558]; *Leonardi v. Chase Nat. Bank of City of New York* [2d Cir. 1936] 81 F.2d 19, cert. den. 298 U.S. 677 [80 L.Ed. 1398, 56 S.Ct. 941]; *Stephen-*

Leedom Carpet Co. v. Republic Nat. Bank [1966] 25 App.Div.2d 645 [268 N.Y.S.2d 377, 378].)

"The venue requirements, with reference to suits against a national bank, as set forth in Section 94 are mandatory. (*Michigan Nat. Bank v. Robertson,* 372 U.S. 591 [9 L.Ed.2d 961, 83 S.Ct. 914]; *Mercantile Nat. Bank at Dallas v. Langdeau,* supra, 371 U.S. 555, 562 [9 L.Ed.2d 523, 529, 83 S.Ct. 520]; *First Nat. Bank of Charlotte v. Morgan,* 132 U.S. 141 [33 L.Ed. 282, 10 S.Ct. 37]; *Monarch Wine Co. v. Butte,* 113 Cal.App.2d 833, 839 [249 P.2d 291].)."

Ebeling v. Continental Illinois National Bank, 272 C.A.2d 726-727.

See also Sec. 418.10 C.C.P.

2. The court below has decided a federal question in a way not in accord with the opinions of this court. The issues which now face this Court were examined by the Court in 1962 in the case of *Mercantile National Bank of Dallas v. Langdeau* (1963) 371 U.S. 555, 9 L.Ed.2d 523, 83 S.Ct. 520. At page 558 of the Court's opinion the Court discusses the problems at length when it states as follows:

"The roots of this problem reach back to the National Banking Act of 1863, 12 Stat. 665, replaced a year later by the Act of 1864, 13 Stat. 99. National banks are federal instrumentalities and the power of Congress over them is extensive. 'National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress and are not to be interfered with by State

lawmaking power of the government may permit.' *Van Reed v. Peoples National Bank,* 198 U.S. 554, 557. Unquestionably, Congress had authority to prescribe the manner and circumstances under which the banks could sue or be sued in the courts and it addressed itself to this matter in the 1863 Act.

By Section 11 of that Act, banking associations were given general corporate powers, among them the power to 'sue and be sued . . . in any court of law or equity as fully as natural persons.' This section, if the teaching of *Bank of the United States v. Deveaux,* 5 Cranch 61, is observed, conferred no jurisdiction upon the courts but merely endowed the banks with power to sue and be sued in the courts as corporations. Congress, however, had more to say about this subject. Section 59 of the 1863 Act provided that suits by and against any association under the Act could be had in any federal court held within the district in which the association was established. No mention was made of suits in state courts. If the law had remained in this form, there might well have been grave doubts about the suitability of national banks in the state courts, as this court noted in *First National Bank v. Union Trust Co.,* 244 U.S. 416, 428. The next year, however, Congress expressly exercised its power to permit national banks to be sued in certain state courts as well as in federal courts. Section 57 of the 1864 Act carried forward the former Section 59 and also added that 'suits . . . may be had . . . any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases . . .'. The phrase 'suit . . . may be had'

was, in every respect, appropriate language for the purposes specifying the precise courts in which Congress consented to have national banks subject to suit and we believe Congress intended that in those courts alone could a national bank be sued against its will.

We would not likely conclude that a Congressional enactment has no purpose or function. We must strike to give appropriate meaning to each of the provisions of Title 12 and its predecessors. See *United States v. Menasche,* 348 U.S. 528, 539; *Montclair v. Ramsdell,* 107 U.S. 148, 152. Appellee, however, would have us hold that any state court could entertain a suit against the national bank as long as state jurisdictional and venue requirements were otherwise satisfied. Such a ruling, of course, would render altogether meaningless the Congressional enactment permitting suit to be brought in the bank's home county. This we are unwilling to do, particularly in the light of the history of Section 57. That section was omitted from Title 62 (National Banks) of the revised sections of 1873 but, at the same time, there were included in Title 13 (the Judiciary) provisions granting the federal courts jurisdiction over suits by and against national banks brought in the district of their residence. These expressed provisions relating to the jurisdiction of federal courts apparently did not solve the entire problem, for Section 5198 of Title 62, revised statutes, was amended in 1875 by adding to it provisions substantially identical to Section 57 of the 1864 Act. Thus, for a second time, Congress specified the precise federal and state courts in which suits against national banks could be brought."

3. The Federal Constitutional question is important in that it will have a direct and instrumental effect upon interstate commerce as conducted by national banking institutions. As previously stated, it would appear that the California Court of Appeal is advising Petitioner that the mere fact of doing business in this state sufficient to establish "minimum contacts" for jurisdictional purposes will act as a waiver of the federally granted venue right to be sued only in the county in which it is chartered.

It would seem unreasonable to think that faced with this mandate from the California courts, Petitioner or other national banking institutions, not chartered within this state, would not have serious reservations in engaging in commerce between themselves and persons or citizens in California.

It has long been held that congressional control over interstate commerce is absolute, and, therefore, any direct interference with it by any state must give way. *McCaw v. Fase* (C.A. Hawaii, 1954) 216 F.2d 700, Cert. den. 75 S.Ct. 340, 348 U.S. 927, 99 L.Ed. 726.

It has also been held that the policy of a statute which Congress has enacted under its constitutional power to regulate interstate commerce may not be defeated or obstructed by state law, whether decisional or statutory. *Philco Corp. v. Phillips Mfg. Co.* (C.C.A. Ill., 1943) 133 F.2d 663, 148 A.L.R. 125.

Finally, in *American Airlines, Inc. v. Town of Hempstead* (D.C. N.Y., 1966) 272 F.Supp. 226. it was held that an ordinance which has an effect on com-

merce must, to be valid, be not only rooted in a proper and real local police power interest, but it must also be free of direct regulation of commerce, it must not burden commerce, and it must not operate in a field fully occupied by federal legislation.

4. The Federal Constitutional question is important in the administration of justice. It is important to note that the opinion of the Court of Appeal establishes no guidelines to determine what acts, if any, will constitute a waiver of the rights imparted under 12 U.S.C. Section 94. Moreover, the decision would appear to be inconsistent with and extend far beyond the criterion established by the federal court and other state courts.

In a 1951 case the Federal Court of Appeal in Illinois held that a national bank, established in New York, had not waived in its entirety the privilege of being sued only in New York even though it had obtained leave to transact business in Illinois for the limited purpose of acceptance and execution of trusts and receipt of deposits with trusts, and there was in Illinois a registered agent authorized to accept service. (*Buffum v. Chase National Bank of City of New York* (C.A. Ill. 1951) 192 F.2d 58, Cert. den. 72 S.Ct. 558, 342 U.S. 944, 96 L.Ed. 702.)

In *Bair v. Michigan National Bank* (1963) 124 N.W.2d 926, 175 Neb. 875, and *Hills v. Burnett* (1963) 125 N.W.2d 66, 175 Neb. 871, it was held that provisions in conditional sales contracts that all matters relating to execution, interpretation, validity and performance would be governed by the laws of the state of residence of the buyers who had resided in Ne-

braska was not a waiver of the national bank's privilege from suit in Nebraska. In *Sulil Realty Corp. v. Rye Motors, Inc.* (1965) 257 N.Y.S.2d 111 and 45 Misc.2d 458, affirmed 262 N.Y.S.2d 989, and 47 Misc. 2d 715, the New York court held that a Connecticut National Bank did not waive its exemption from suit in New York by acquisition of retail installment contracts from New York dealers nor by public sale in New York of defaulted property nor by invoking the jurisdiction of the New York courts in other unrelated actions nor by arguing in opposing affidavits, material substance of application to punish it for contempt where in each instance the bank had challenged jurisdiction.

Also in 1965 a New Jersey court held that where a foreign national bank had been vigilant in demanding the protection afforded by this section, there was no act which could be considered to constitute a waiver of that bank's rights under the section.

Most recently, on September 28, 1972 the Ninth Circuit Court of Appeals in case No. 72-2049 and entitled *First National Bank of Boston v. U. S. District Court for the Central District of California* (1972) ..... F.2d ....., the Court, relying on the provisions of 12 U.S.C. Section 94, held that a former employee of a Massachusetts National Bank could not maintain an action in California, even though the Massachusetts bank maintained a California office.

It is respectfully submitted by Petitioner:

(1) That the rights and privileges granted to national banking institutions as federal instrumentalities by the United States Congress should not be sub-

ject to compromise or loss by state courts acting independently without the assistance of clear guidelines from this Court in order to effectuate the uniform administration of justice;

(2) That the decision of the California Court of Appeal renders 12 U.S.C. Section 94 meaningless and this, if it is to be done, should be the subject of the legislative process and not the judicial process.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the California Court of Appeal.

Dated, Fremont, California,
November 14, 1972.

Respectfully submitted,
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Attorneys for Petitioner.

(Appendices Follow)

Appendix A

In the Court of Appeal
State of California
First Appellate District

DIVISION THREE

1 Civil No. 31,750

Michigan National Bank,
Petitioner,
vs.
Superior Court, County of Contra Costa,
Respondent.
Larry H. Kell,
Real Party in Interest.

[August 21, 1972]

BY THE COURT:

The petition for a writ of mandate is denied.

Dated Aug 21, 1972

Draper, P.J.

Appendix B

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102
Sep. 20, 1972

Dear Sir: I have this day filed Order
Hearing Denied

In re: 1 Civ. No. 31750

Michigan Nat'l Bank

vs.

Superior Court, Contra Costa

Respectfully,

G. E. Bishel
Clerk

Appendix C

(Certified for Publication)

In the Court of Appeal

State of California

First Appellate District

DIVISION ONE

1 Civ. 30069
(Sup. Ct. No. 122937)

Michigan National Bank, a National Banking Association,
Petitioner,

vs.

Superior Court of the State of California in and for the County of Contra Costa,
Respondent,

Larry H. Kell,
Real Party in Interest.

[January 24, 1972]

OPINION

By its petition for writ of mandate, Michigan National Bank, a national banking association organized and existing under the laws of the United States of

America (12 U.S.C.A., §§ 21 et seq.), seeks review of an order which denied its motion to quash service of summons (see Code Civ. Proc., § 418.10) which was purportedly effected through service on the Secretary of State in California (see Corp. Code, §§ 6500-6504). Following the grant of an alternative writ, the parties filed further briefs in support of their respective positions. On a consideration of the record it is determined that the trial court properly denied petitioner's motion to quash the service of summons. The petition for a peremptory writ of mandate must be denied, and the alternative writ heretofore issued should be discharged.

Petitioner's motion was made on the grounds that the court lacked jurisdiction over it because it was a federally chartered national banking association, located and with its principal office and place of business in Grand Rapids, State of Michigan, and could only be sued at that place under the provisions of section 94 of title 12 of the United States Code.[1] It is concluded that in refinancing the purchase of per-

---

[1]Section 94 of Title 12, United States Code (R.S., § 5198; Feb. 18, 1875, ch. 80, § 1, 18 Stat. 320; March 3, 1911, ch. 231, § 291, 36 Stat. 1167) provides as follows: "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

For historical background of the statute and related provisions see Mercantile Nat. Bank v. Langdeau (1963) 371 U.S. 555, 558-561; Bruns, Nordeman & Co. v. American National Bank & Trust Co. (2d Cir. 1968) 394 F.2d 300, 303; and Raiola v. Los Angeles First Nat. Trust & S. Bank (1929) 133 Misc. 630, 631-636 [233 N.Y.S. 301, 302-305].

sonal property within this state the petitioner became subject to the jurisdiction of the courts of this state with respect to any such transaction, within the provisions of Code of Civil Procedure section 410.10 which provides: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States": and that any privilege it may have under the laws of the United States to be sued elsewhere was waived as to such transaction.

I

On November 25, 1967 real party in interest purchased a 1947 used Beech Aircraft from A.S.L. for the sum of $5,118, of which sum $1,018 was paid, and $4,100 was financed for a total time balance of $5,526 to be paid in 60 monthly installments of $92.10. The time balance was represented by a note on a printed form payable to *A.S.L.* [inserted], as "(dealer)" "at the office of Michigan National Bank (Grand Rapids, Michigan)." The note was endorsed on a printed form, "Pay to the order of Michigan National Bank, Grand Rapids, Michigan. Without Recourse" by *A.S.L.* [inserted] as "Seller." It was secured by a form chattel mortgage which referred to the buyer as "Mortgagor" and the seller "Mortgagee." Inserted in the form was a description of the aircraft, a statement of the transaction (cash sales price, etc.). It contained a stipulation, "4. That said aircraft will be based at *CONCORD, CALIF.* [inserted] and will not be removed from the continental United States, or the base indicated for a period of thirty (30) days, without

written consent of Mortgagee; Mortgagee shall have the right to inspect said aircraft periodically at its discretion." It further recited, "11. Mortgagor acknowledges the intended assignment of this mortgage and agrees that the holder shall have all the rights of the Mortgagee herein, and Mortgagor agrees not to set up any claim, defense or counterclaim against the holder, limiting himself in remedy to an action against the original Mortgagee."

The chattel mortgage was executed by A.S.L., as mortgagee, and by real party in interest, as mortgagor, on November 25, 1967. An acknowledgement of each signature is dated the following day. On the latter day A.S.L. as "Dealer-Seller" signed and acknowledged an assignment form on the printed chattel mortgage which recites in part, "For value received, the undersigned hereby sells and assigns to Michigan National Bank, its successors and assigns, all his (its) right, title and interest in and to the within chattel mortgage. . . ."

According to the petitioner, the principal action is one for damages for the alleged taking and conversion of personal property.[2] The complaint was filed on

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[2]The trial court had the pleadings before it at the time of considering the petitioner's motion. Therefore this court, on its own motion, pursuant to Rule 12(a) of California Rules of Court, has augmented the record by ordering that the original papers, records and exhibits on file with the superior court at the time of petitioner's motion was considered be transmitted to it and be deemed a part of the record in these proceedings.

The complaint alleges that on June 25, 1970, the plaintiff (real party in interest here) was the owner of an aircraft of the reasonable value of $7,000, in which he had an equity of $4,070.80, and that on that date the bank and other defendants unlawfully took and carried away the aiplane and converted and disposed of it

November 24, 1970; summons was issued on March 22, 1971; service was purportedly made on petitioner by service on the Secretary of State on May 29, 1971; and on June 4, 1971 petitioner filed its notice of motion to quash the service of summons, which motion was denied July 2, 1971. The petition under review was then filed. The motion and petition are supported by the declaration of a vice-president of petitioner from which it appears that petitioner is a corporation and national banking association chartered, organized and existing under the laws of the United States of America with authorized offices, as a result

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to their own use. Plaintiff seeks recovery of the value of his equity, loss of use at $350 per month, punitive damages in the sum of $10,000, and attorney's fees and costs.

Petitioner's motion to quash was set for hearing on July 2, 1971. On June 18, 1971 the plaintiff filed his memorandum of points and authorities in opposition to the petitioner's motion. This document reveals the facts and documents pertaining to the original sale and the financing of the purchase of the airplane. It is not verified under oath or by declaration as provided by law. A copy was mailed to the attorney for petitioner on June 17, 1971. On June 29, 1971 petitioner filed the affidavit of its vice-president, and its points and authorities in support of its motion. No attempt was made to controvert the allegations concerning the petitioner's participation in the financing of the airplane. It is, therefore, assumed that the trial court considered these documents. They were also attached to the points and authorities submitted in opposition to the petition filed with this court. On this review petitioner asserts, "It is respectfully submitted that the fashion in which the supposed waiver has been raised is improper and inadequate, but more importantly, that there is nothing to support even the remotest suggestion that there has been a deliberate relinquishment of defendant's right much less 'clear and convincing evidence' as required by the cases." It must be assumed that if objection had been made in the lower court to the form in which these facts were presented, it could have been readily corrected. The documents are not something that could be easily fabricated. If so fabricated their existence and negotiation to petitioner could have been denied. In support of the order of the lower court they are considered part of the record in these proceedings.

of consolidations, in six cities, including Grand Rapids, within the State of Michigan, and no principal or other office and place of business outside of the State of Michigan. He expressly denied the bank had any office in the State of California.

II

The general question of jurisdiction over the petitioner as a foreign corporation, irrespective of the provisions of section 94, may first be examined. Section 410.10 of the Code of Civil Procedure, quoted above, manifests an intent to exercise the broadest possible jurisdiction. The constitutional perimeters of this jurisdiction are found in the decisions of the United States Supreme Court. (See Hanson v. Denckla (1958) 357 U.S. 235, 245-254; McGee v. International Life Ins. Co. (1957) 355 U.S. 220, 222-224; and Internat. Shoe Co. v. Washington (1945) 326 U.S. 310, 316-320; and Buckeye Boiler Co. v.. Superior Court (1969) 71 Cal.2d 893, 898-900). This court has already ruled that the financing of the purchase and sales of airplanes within the state is an activity which may subject the financing institution to the jurisdiction of the courts of this state with respect to disputes connected with such transactions. (See Pope v. National Aero Finance Co. (1963) 220 Cal.App. 709, 719.) *McGee v. International Life Ins. Co.,* supra, makes it clear that jurisdiction may attend an isolated transaction. There the court noted, ". . . so far as the record before us shows, respondent has never solicited or done any insurance business in California apart from the policy involved here." (355 U.S. at

p. 222.) Nevertheless, the court ruled, "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State. [Citations.]" *(Id.,* at p. 223.) Here the contract was delivered in California, the petitioner undertook the dealer-seller's obligation under the chattel mortgage, the payments such as were made were to be remitted from California, and upon performance, or excuse from performing, the real party in interest was entitled to receive clear title to the airplane in this state. He is in a position analogous to Mr. McGee's beneficiary in the life insurance company case.[3]

The question remains whether section 94 precludes the exercise of this jurisdiction by the respondent court.

III

In the earliest cases construing the provisions now found in section 94, the exercise of state jurisdiction was upheld. In Casey v. Adams (1880) 102 U.S. 66 the court held that the receiver of a national banking association, who asserted a claim to the proceeds which had been realized from the sale of land on foreclosure of a mortgage, was subject to suit in the state judicial district in which the land was situated because the action was local not transitory.

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[3]In Kraemer v. Coward (1934) 2 Cal.App.2d 506, the court held that a Michigan financial institution which took an assignment of a note and deed of trust payable to a local "trustee" was not doing business in the state. The issue arose in another context, and, in any event, the case is deprived of value as a precedent by the adoption of section 410.10 of the Code of Civil Procedure which necessitates a reappraisal of what constitutes "doing business" for the purposes of jurisdiction.

Subsequently in First National Bank of Charlotte v. Morgan (1889) 132 U.S. 141, the court upheld a judgment allowing recovery for the exaction of usurious interest as against the contention that the action had not been brought in the county or city in which the national banking association was located. The court noted, "This exemption of national banking associations from suits in state courts, established elsewhere than in the county or city in which such associations were located, was, we do not doubt, prescribed for the convenience of those institutions, and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process from state courts. [Citations.]" (132 U.S. at p. 145.) It concluded, "Considering the object as well as the words of the statute authorizing suit against a national banking association to be brought in the proper state court of the county where it is located, we are of opinion that its exemption from suits in other courts of the same State was a personal privilege that it could waive, and which, in this case, the defendant did waive, by appearing and making defence without claiming the immunity granted by Congress." *(Id.)*

In Mercantile Nat. Bank v. Langdeau (1963) 371 U.S. 555 the court, over the dissent of one associate justice, entertained an appeal from an order of a state court which had refused to transfer an action, which alleged a conspiracy to defraud an insurance company, to the county in which the defendant and appellant national banking association was located.

In answer to the contention that the provisions of section 94 were permissive only, and not mandatory, five members of the court, two justices dissenting, joined in asserting, "All of the cases in this Court which have touched upon the issue here are in accord with our conclusion that national banks may be sued only in those state Courts in the county where the banks are located." (371 U.S. at p. 561, fn. omitted.) The opinion rejected the argument that under such a construction "a litigant will be unable to join two national banks in the same action in the state courts if they are located in different counties or in the federal courts if they are located in different districts" as a question not presented in the cases before it, and as, in any event, a matter for consideration by Congress *(id.,* p. 563). The decision also overruled the contention that the statute had been repealed by subsequent legislation adopted in 1882 *(id.,* at pp. 565-567).

Finally in Michigan Nat. Bank v. Robertson (1963) 372 U.S. 591, decided nine weeks later, the court, in a per curiam opinion in which two justices concurred only in the result, reversed two decisions of the Supreme Court of Nebraska which had permitted recovery under the Nebraska usury law against a national bank located in Michigan. Notes and lien instruments for the unpaid balance of the purchase price of house trailers had been executed by the plaintiffs and respondents and delivered to the local dealer, who in turn negotiated them to the Michigan bank. The court found that the action "for the recovery of a

fine, forfeiture, or penalty imposed by statute," was transitory not local and so not within the principle enunciated in Casey v. Adams, supra, 102 U.S. 66 (372 U.S. at pp. 593-594). It was contended that the bank had waived the benefit of section 94 because the documents in question provided that all matters relating to their execution, interpretation, validity and performance were to be determined by the law of the State of Nebraska. The court refused to pass on the matter because the state court had not yet ruled on that issue, and the cases were remanded for further proceedings *(id.,* p. 594).[4]

On remand the Supreme Court of Nebraska determined that the provisions of the contract, on which the buyer relied as showing a waiver of the privilege conferred by section 94, were not intended to relate to venue. The judgment was reversed as to the national bank with directions to dismiss the action. (Hills v. Burnett (1963) 175 Neb. 871, 872-873 [125

[4]In a dissent authored by Mr. Justice Black, in which Mr. Justice Douglas concurred, the argument against the strict construction of the venue statute is stated as follows: "Each lawsuit grew out of a business transaction in which the Michigan bank financed a Nebraska resident's purchase of a house trailer from a Nebraska dealer. Now, under this Court's holding, these people in Nebraska who allege that their contracts were usurious under Nebraska law must, unless the bank be held to have waived statutory venue, go all the way to Michigan to try to vindicate their rights against the bank." (372 U.S. at p. 595. See also United States National Bank v. Hill (9th Cir. 1970) 434 F.2d 1019, 1020; Bruns, Nordeman & Co. v. American National Bank & Trust Co. (2d Cir. 1968) 394 F.2d 300, 302-303 and 304; Frankford Supply Co. v. Matteo (E.D.Pa. 1969) 305 F.Supp. 794, 795; Lapinsohn v. Lewis Charles, Inc. (1968) 212 Pa.Super. 185 [240 A.2d 90, 92-95]; Chaffee v. Glens Falls Nat. Bank & Trust Co. (1953) 204 Misc. 181, 183-184 [123 N.Y.S.2d 635, 638]; and Note. An Assault on the Venue Sanctuary of National Banks (1965) 34 Geo.Wash.L.Rev. 765, passim.)

N.W.2d 66, 67-68]. See also Bair v. Michigan National Bank (1963) 175 Neb. 875, 876-877 [124 N.W. 2d 926, 927].)

An examination of the decisions which were overruled by the United States Supreme Court reflects that the following facts were brought out at the trial of the actions: the documents executed in connection with the purchasers' application to purchase included a note to the vendor payable, as in this case, at the office of the national bank in Michigan, a conditional sales contract (here a chattel mortgage), a customer's statement on the bank's form, and a purchase statement. Printed forms for the bank's customer statement, note, and conditional sales contract had been furnished an officer of the vendor on request. The note and contract were purchased by the bank. It issued a payment book to the purchasers. A certificate of title was ultimately obtained showing title in the purchasers, subject to the bank's lien. This certificate was held by the bank. The bank acknowledged that it had been engaged in financing mobile homes located in Nebraska, and set forth the parties with whom it had been doing business, including the vendor in that case for a period of almost three years. It admitted "that the bank held lien interests and title rights under its right to repossess, in certain mobile homes in the State of Nebraska, arising out of the bank's position as an assignee of the vendor's interest in retail installment sales contracts; and that the bank had owned certain mobile homes which were in the possession of trailer sales companies under wholesale

floorplan trust receipt agreements." (See Robertson v. Burnett (1961) 172 Neb. 385 at pp. 390-391 [109 N.W.2d 716 at pp. 719-720]; and Hills v. Burnett (1961) 172 Neb. 370 at pp. 379-382 [109 N.W.2d 739 at pp. 745-746].) The court concluded that the bank was doing business in Nebraska so as to be amenable to suit commenced by substituted service (see Robertson v. Burnett, supra, 172 Neb. 385, 394 [109 N.W.2d 716, 721-722]; and Hills v. Burnett, supra, 172 Neb. 370, 372-376 [109 N.W.2d 739, 741-743]). This conclusion was not subsequently overturned, although it was rendered nugatory by the interposition of the policy embodied in section 94 as construed by the United States Supreme Court. Unfortunately the foregoing facts were not reviewed on the issue of waiver when the cases were remanded.

In this state, despite an early interpretation that the statute (12 U.S.C.A., § 94; Rev. Stat. § 5198) did not deprive the court of jurisdiction (Fresno v. National Bank v. Superior Court (1890) 83 Cal. 491, 498-500), the courts have recognized that the provisions are mandatory and require quashing of the service of summons if the national bank is located outside of the state (Ebeling v. Continental Illinois Nat. Bank & Trust Co. (1969) 272 Cal.App.2d 724, 726-727), or a change of venue if the national bank is located in a county within the state other than that in which the action was commenced. (Monarch Wine Co. v. Butte (1952) 113 Cal.App.2d 833, 839. See also Fresno National Bank v. Superior Court, supra, 83 Cal. 491, 501; and United States National Bank v. Hill (9th Cir.1970) 434 F.2d 1019, 1021.)

The applicable rules were summarized in *Ebeling*, as follows: "A national bank for jurisdictional purposes is a citizen of the state wherein it is established or located [citation] and can only be sued in a state court in the county in which it is located. A national banking association is 'established' or 'located,' as those terms are used in section 94, only at the national banking association's principal place of business as set forth in its charter. [Citations.]

"The venue requirements, with reference to suits against a national bank, as set forth in section 94 are mandatory. [Citations.]" (272 Cal.App.2d at pp. 726-727.)

Real party in interest, the plaintiff below, asserts that the national bank waived the privilege conferred by section 94 because it conducted business in California. He points out that if the bank had appointed an agent for the service of process in California, it could not subsequently assert a right to be sued elsewhere. (See Neirbo Co. v. Bethlehem Corp. (1939) 308 U.S. 165, 175, construing the venue provisions of 28 U.S.C.A., § 112. See also Davis v. Smith (3d Cir. 1958) 253 F.2d 286, 288-289, construing U.S.C.A., § 1391(a), and same case below (E.D.Pa.1954) 126 F.Supp. 497, 499-502. Cf. Buffum v. Chase National Bank of City of New York (7th Cir. 1951) 192 F.2d 58, 61 [cert.den. (1952) 342 U.S. 944], where consent deemed limited.) It is asserted that the bank by doing business in California voluntarily consented to the designation of the Secretary of State as an agent for the service of process and thereby waived the

privilege conferred by section 94. (See Corp. Code, § 6501.) In the foregoing cases, however, there was an actual designation of an agent by the waiving party. In *Davis v. Smith*, supra, the District Judge pointed out "the appointment of an agent for acceptance of service of process *by operation of a state statute solely*, without an affirmative 'act' on the part of the defendant in appointing the agent, lay not of and in itself constitute a waiver of venue, i.e., a binding indication of the defendant's willingness to be sued in that state." (126 F.Supp. at p. 500, emphasis in opinion.) The plaintiff, therefore, can find little support from *Neirbo* or *Davis*.

Other cases on which plaintiff relies as demonstrating waiver of the requirements of section 94 are predicated upon facts which transcend those presented in this case.[5] In this case there is no

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[5]In Lapinsohn v. Lewis Charles, Inc. (1968) 212 Pa.Super. 185 [240 A.2d 90] the national bank which sought relief was located in Camden, New Jersey, and had been subjected to an attachment against one of its customers levied at a Philadelphia, Pennsylvania branch of the bank. The court reversed the trial court's order dismissing the bank, and reinstated the attachment. It concluded, "If a national bank avails itself of a jurisdiction by setting up a branch to conduct general banking business, it has manifested an intent to be found in that jurisdiction for purposes of suits arising out of any business conducted there. It is to be remembered that the original purpose of the venue restrictions was to limit suits where most of the records were kept and business conducted. But, if a branch can be established to conduct business, there is no logical reason to rigidly apply a statute when doing so actually subverts its purpose." (212 Pa. Super. at pp. 192-193 [240 A.2d at pp. 94-95]. See also Frankford Supply Co. v. Matteo (E.D.Pa. 1969) 305 F.Supp. 794, 796; Contra, United States National Bank v. Hill (9th Cir. 1970) 434 F.2d 1019, 1020; and Leonardi v. Chase Nat. Bank of City of New York (2d Cir. 1936) 81 F.2d 19, 22; and see Raiola v.

showing that petitioner has a branch office in California, that it accepted appointment to act under authority of the courts of this state, that it utilized the courts of this state to enforce the obligation in question, or that it undertook to perform any obligations, jointly or severally, within this state.

The foregoing precedents indicate that if the national bank seeks to use a state court, other than in the county or city in which it is located, to enforce obligations which are due it, it may be subject to countersuit for matters arising out of that transaction. This suggests that when self-help is used for the same purpose, claims arising out of the assertion of the bank's rights should be heard where they occur. Nevertheless in *Ebeling v. Continental Illinois Nat. Bank & Trust Co.*, supra, which was characterized by the court as an action "to recover personal property

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Los Angeles First Nat. Trust & S. Bank (1929) 133 Misc. 630, 635-636 [233 N.Y.S. 301, 305-308].)

In Lichtenfels v. North Carolina Nat. Bank (1963) 260 N.C. 146, 150-151 [132 S.E.2d 360, 363; 1 A.L.R.3d 897, 903] a national bank which had accepted appointment as a testamentary trustee was held accountable in the forum where the will was probated.

In County of Okeehobee v. Florida Nat. Bank (1933) 112 Fla. 309, 314 [150 So. 124, 126], the court reversed an order dismissing the national bank because it found that the bank waived the venue privilege by jointly contracting with a local bank to perform a contract with the local county commissioners. (Cf. The Exchange National Bank of Chicago v. Arne Rock and Grand Turk Line, Ltd. (Fla.App. 1967) 197 So.2d 52, 53.)

In Continental Nat. Bank v. Folsom (1887) 78 Ga. 449, 456-458 [3 S.E. 269, 273-274] a national bank which had filed an attachment bond in an action to recover from the surety on an unpaid promissory note was held amenable to suit on the bond in the forum where the bond was posted.

See also Note, An Assault on the Venue Sanctuary of National Banks (1965) 34 Geo.Wash.L.Rev. 765; and Annotation 1 A.L.R. 3d 904.

and damages for its taking" (272 Cal.App.2d at p. 727), the order quashing the service of summons was upheld. (*Id.* See also Holst v. Bank of America National Trust & Sav. Assn. (1971) ..... Ark. ....., ... [467 S.W.2d 397, 398].)

In Insurance Co. of No. A. v. Allied Crude Veg. Oil R. Corp. (1965) 89 N.J.Super. 518 [215 A.2d 579] it was contended that three national banks, located in other states, had waived the provisions of section 94 by making loans and taking warehouse receipts on commodities stored, insured and destroyed by insured risks in New Jersey. Despite the fact that the action was one to rescind the basic insurance because of the alleged fraud, misrepresentation and breach of warranty of the owner-borrower, the court noted, "that none of the transactions by which [the banks] acquired the warehouse receipts and insurance endorsements in question was consummated within this State." It concluded: "It is apparent on the statement of the factual contentions that no intentional relinquishment may be found to have been made by the banks either directly or by implication. I am satisfied that there has been no waiver. [Citations.]" (89 N.J. Super. at p. 527 [215 A.2d at p. 587]. See also Stephen-Leedom Carpet Co. v. Republic Nat. Bank (1966) 25 A.D.2d 645 [268 N.Y.S.2d 377, 378].)

In Sulil Realty Corp. v. Rye Motors, Inc. (1965) 45 Misc.2d 458 [257 N.Y.S.2d 111] the plaintiff sought to hold a national bank located in Connecticut in contempt because it had sold and disposed of prop-

erty of the judgment-debtor in a New York action in disregard of a restraining notice and had failed to reply to information subpoenas, both served on it by mail. This court rejected plaintiff's claim that the bank was subject to the jurisdiction of the New York court, and had waived the provisions of section 94, "first, by conducting a substantial business in this County and elsewhere in this state in connection with the financing of motor vehicles purchased by residents of New York; and second, by invoking the jurisdiction of this court in three actions (which are not shown to be related to the actions here involved)." (45 Misc.2d at p. 461 [257 N.Y.S.2d at pp. 115-116].) On appeal, however, the order denying relief was affirmed solely on the ground that title to the property was in the bank and not in the judgment-debtor at the time the restraining order was served. (47 Misc.2d 715 [262 N.Y.S.2d 989].)

None of the foregoing precedents appear to decisively dispose of the contention raised by the plaintiff below. The question of waiver has not been considered in this state. In *Ebeling v. Continental Illinois Nat. Bank & Trust Co.*, supra, the court stated, "It does not appear, and it is not urged that defendant bank has waived the venue privilege as to this action. [Citation.]" (272 Cal.App.2d at p. 728.) In *Monarch Wine Co. v. Butte,* supra, there was no suggestion that the national bank located in Los Angeles County had waived its right under section 94 to have the venue changed from San Francisco County.

A review of *Michigan National Bank v. Robertson*, supra, and the related Nebraska cases preceding and following that decision, reveals that the Supreme Court of the United States did not consider that the facts developed eliminated waiver as a matter of law. If so, there would have been little point in remanding the case to the state court for further proceedings. Can it be assumed conversely that a finding of waiver would have been sustained? There is no controlling precedent to the contrary. The criticism of the limitations on the right to sue a national bank (see fn. 4 above), the trend of the decisions with regard to court jurisdiction over branch banks, and jurisdiction over foreign corporations and persons generally (see Part II above), the absence of compelling authority to the contrary, and the invitation in *Robertson* that the state courts may determine the question of waiver, all lead to the conclusion that each case should be evaluated on its facts.

In this case it is concluded that the Michigan bank, by soliciting with its forms the refinancing of sales of airplanes, sold and to be harbored in this state, is not only doing business in this state so as to be subject to the jurisdiction of the courts of this state in disputes involving such transactions, but also has waived the requirements of section 94 insofar as such suits are concerned. Here it is alleged that the purchaser-plaintiff was wronged by the bank's action in enforcing its security interest in an airplane purchased in this state, and financed on forms which

indicated that petitioner would be the real party in interest in the payment of the balance of the purchase price. It was contemplated that the plane would be based in the county where the action below was commenced, and it is alleged that the purchaser has wrongfully been deprived of his interest in the airplane by a seizure there. Under these circumstances, the bank, if not by the original financing, at least by the combination of that financing and its alleged actions in attempting to enforce its security interest in this state, has waived its privilege to insist on being sued in Michigan.

The alternative writ of mandamus is discharged and the application for a peremptory writ is denied.

Certified for Publication.

Sims, J.

We Concur:

Molinari, P. J.

Elkington, J.

Appendix D

In the Court of Appeal
State of California
First Appellate District

DIVISION ONE

1 Civil 30069
(Sup.Ct. No. 122937)

Michigan National Bank, a National Banking Association,
Petitioner,
vs.
Superior Court of the State of California in and for the County of Contra Costa,
Respondent,
Larry H. Kell,
Real Party in Interest

THE COURT:

The opinion filed January 24, 1972 is modified by the addition of the following citations to footnote 2 on page 3a:

"(See Fuller v. Goodyear Tire & Rubber Co. (1970) 7 Cal.App.3d 690, 693; Waller v. Waller

(1970) 3 Cal.App.3d 456, 465; People v. United Bonding Ins. Co. (1966) 240 Cal.App.2d 895, 896, fn. 2; Frantz v. Inter-Insurance Exchange (1964) 229 Cal.App.2d 269, 277. Cf. Truslow v. Woodruff (1967) 252 Cal.App.2d 158, 163-64. Note, Estate of Wilson (1953) 116 Cal.App.2d 523, 526; Estate of Da Rosa (1947) 82 Cal.App.2d 550, 555-556; and People v. Duffy (1930) 110 Cal.App. 631, 635-636.)"

Petitioner's petition for a rehearing is denied.

Dated:

Molinari, P. J.

Appendix E

Joseph W. Jay, Jr.
11th Floor, Tribune Tower
Oakland, California
Telephone: 834-9555

Superior Court of California,
County of Contra Costa

No. 122937

Larry H. Kell,
Plaintiff,
vs.
Michigan National Bank, et al.,
Defendants.

[June 7, 1972]

AFFIDAVIT

State of Michigan
County of Kent—ss.

Willis Ash, being first duly sworn, deposes and says:

That he is an attorney at law, duly admitted to practice before the highest court in the State of Michigan and that he is now and has been for over five years last past an officer of Michigan National Bank; that your affiant is familiar with the law regarding waiver of a right given by law, and the

intent necessary to constitute waiver of any right, including the right of a bank chartered as a national bank under the laws of the United States of America; that affiant is fully familiar with the manner of doing business by Michigan National Bank for longer than the last five years and knows the policy of the Michigan National Bank with respect to consenting to be sued in the State of California as well as all states other than Michigan on transactions involving the purchase of aircraft contracts and that the said Michigan National Bank has at all times, for longer than the five years last past, maintained a policy of not permitting actions which, under the provisions of 12 United States Code Sections 94 et seq., the bank is entitled to have tried in the State of Michigan; that the Michigan National Bank has never, to affiant's knowledge, intended to waive the right to have actions against it allegedly arising out of aircraft installment sales contracts made in California, or any other action arising out of activity in California involving said bank, trial in the apropriate Court in the State of Michigan and said bank did not intend to waive its right to have the above entitled action tried in the State of Michigan.

/s/ Willis L. Ash, Jr.

Subscribed and sworn to before me on June 1, 1972.

(Seal) /s/ Marilynn C. Zarbock

Notary Public, Kent County, Michigan.
My Commission expires June 29, 1974

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1972

No.

MICHIGAN NATIONAL BANK,
a National Banking Association, *Petitioner,*

VS.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA,
Respondent,
LARRY H. KELL, *Real Party in Interest.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the Court of Appeal of the State of California

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INTRODUCTION

The issues raised in the petition of Michigan National Bank were first argued in a motion before the California Court of Appeal, First Appellate District, Division One, prior to the motion which petitioner seeks to have reviewed. *Michigan National Bank* v.

Superior Court, 23 Cal. App. 3d 5, 99 Cal. Rptr. 823 (1972). The denial of petitioner's first motion became final on February 23, 1972. Petitioner did not seek review of that judgment, either in the California Supreme Court or in this Court. The previous decision was res judicata in petitioner's second appeal to the Court of Appeal, Division Three, on which petitioner now seeks review.

The Writ should be denied since judgment on this issue was entered more than ninety (90) days prior to filing of the petition, when the opinion of the earlier Court of Appeal was entered. 28 U.S.C. Section 2101 (c). It should also be denied since the decision of that earlier Court of Appeal, not having been appealed, is now res judicata.

STATEMENT OF THE CASE

Respondent and Real Party in Interest, Larry H. Kell, commenced action No. 122,937 in the Superior Court of the State of California, in and for the County of Contra Costa, on November 4, 1970, for the unlawful taking and conversion of his personal property, an airplane. Service of summons was made on defendant-petitioner, Michigan National Bank, a National Banking Association (hereinafter Michigan N. B.) through the office of the Secretary of State.

On June 4, 1971, Michigan N.B. filed a motion to quash service of summons, based on the venue provision of Title 12, U.S.C. Section 94 which provided

for suit in the State in which the bank is established. After written and oral arguments the motion to quash was denied.

Michigan N.B. then filed a motion to stay action or dismiss pursuant to Section 418 (a) (2) of the California Code of Civil Procedure, *upon the same ground* that the venue requirements of Title 12, United States Code, Section 94, required that said action either be dismissed or be transferred to and tried in the State of Michigan.

On July 12, 1971, Michigan N.B. filed a Petition for Writ of Mandate in the Court of Appeal, State of California, First Appellate District, Division One, and the hearing of Michigan's motion to stay or dismiss was continued by stipulation of the parties pending a decision. On January 24, 1972, the Court of Appeal filed its opinion, *Michigan National Bank v. Superior Court,* 23 Cal. App. 3d 5, 99 Cal. Rptr. 823 (1972), denying the Petition for Writ of Mandate on the following grounds:

> 1. That Michigan N.B. solicited within the State, with its forms, the refinancing of sales of airplanes, sold within the State, and to be harbored in the State.
>
> 2. That respondent Kell, the purchaser and plaintiff, alleged he was wronged within the State by the bank's unlawful action in taking, converting, and disposing of his airplane, which was purchased in this State by plaintiff, and financed on forms executed in this State which in-

dicated that Michigan N.B. would be the Real Party in Interest in the payment of the purchase price.

3. That it was contemplated that the airplane would be based in the county where the action was commenced and it is alleged the airplane was seized there.

On the basis of the foregoing facts, the Court of Appeal concluded that:

1. Michigan N.B. is doing business in California and therefore is subject to the jurisdiction of the Courts of the State of California.

2. Michigan N.B. has, on the facts, waived its federally given right to have actions in which it is named as a defendant, tried in the State and district where the bank is "established", i.e., the State of Michigan.

Subsequent to the filing of this opinion on January 24, 1972, Michigan N.B. filed a Petition for Rehearing. The opinion was modified solely by adding further citation on February 23, 1972, at the same time the petition for rehearing was denied. *Michigan National Bank v. Superior Court,* 23 Cal. App. 3d 5, 99 Cal. Rptr. 823 (1972).

Michigan N.B. failed to file a petition for hearing in the California Supreme Court within the required time, and was subsequently denied relief from default due to inadvertence and mistake by the California Supreme Court.

Next, the motion to stay or dismiss which had previously been filed before the Superior Court was argued by Michigan N.B., on the same grounds as its now-denied Writ of Mandate. The Superior Court of Contra Costa County therefore denied Michigan's motion to stay or dismiss on July 3, 1972.

On July 13, 1972, Michigan N.B. again filed a Petition for Writ of Mandate in the Court of Appeal of the State of California, First Appellate District, Division Three. Michigan again argued the same contentions that had been made, and had been rejected, in its previous Petition for Writ of Mandate. This time the Petition for Writ of Mandate was denied without opinion.

To quote from Michigan's Statement of the Case:

> "It seems clear that the denial of this Petition for Writ of Mandate, without opinion, is based primarily on the decision of the Court of Appeal of the State of California, First Appellate District, Division One, which was filed on January 24, 1972, and subsequently modified on February 23, 1972."

The second Petition for Writ of Mandate was rejected because, as plaintiff-respondent Kell pointed out in his brief, it was an attempt to argue *the very same issues* decided by the prior petition. The first Court of Appeals decision was res judicata in Michigan's attempt to relitigate the issue of venue for, and jurisdiction over, defendant Michigan N.B.

Michigan N.B. was denied a hearing by the California Supreme Court on September 20, 1972.

DISCUSSION

Petitioner Michigan N.B. sought and received a determination of its claim that plaintiff Kell should be denied access to the Courts of this State and compelled to travel to Michigan with his witnesses to sue for an airplane that he had purchased, financed and based within California, which had been wrongfully converted within California. The first denial of a petition for Writ of Mandamus, in Division One of the First Appellate District Court of Appeal, held for plaintiff in a detailed opinion which carefully considered Michigan's contentions. Michigan did not appeal from that decision, filed January 24, 1972, and modified by adding further citations on February 23, 1972. That denial became final when filed. Cal. Rules of Court 24 (a).

It is well settled that a final judgment rendered upon the merits of an application for a peremptory Writ of Mandamus comes within the principle of res judicata, and is a bar to another application for the same writ by the same party under the same circumstances, or to another action involving the same issues and in which the same relief is sought. *Price v. Sixth District Agricultural Association,* 201 Cal. 502, 515, 258 P. 387 (1927).

The first Denial of Petition for Writ of Mandate was thus conclusive and binding on petitioner Michigan's attempt to reargue the issues previously decided.

Petitioner Michigan's Petition is therefore wholly without merit. Under the guise of appealing a denial

without opinion of a Petition for Writ of Mandamus, Michigan N.B. seeks to gain still another opportunity to argue an issue which has already been decided between respondent and petitioner more than ninety (90) days prior to filing of his petition for Writ of Certiorari. Petitioner Michigan N.B. is, in fact, attempting to try its case all over again in the Supreme Court, with the added hindsight of its unsuccessful attempt in the Third Division, First District Court of Appeal, to relitigate the adverse decision rendered in the First Division, First District Court of Appeal.

CONCLUSION

Petitioners have received a full and thorough adjudication of these very issues in their first go-around in the California Court of Appeal. The adverse decision that resulted is res judicata. Yet petitioners now seek to relitigate the very same contentions that were previously raised and resolved.

Since petitioners never sought any review of that earlier judgment on this issue, and since it became final more than ninety (90) days prior to filing the Petition for Writ of Certiorari should be denied.

Dated, December 11, 1972.

Respectfully submitted,

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Attorney for Real Party in Interest.